

FINAL AWARD ALLOWING COMPENSATION
(Supplementing Award and Decision of the Labor and Industrial Relations
Commission after Remand from the Missouri Supreme Court
and Increasing Compensation Due to Change of Condition)

Injury No.: 91-193274

Employee: Tracy Farmer Cummings
Employer: Personnel Pool of Platte County
Insurer: Liberty Mutual Insurance Company
Date of Accident: October 1, 1991

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.470 RSMo. We have reviewed the evidence on re-hearing, read the briefs and considered the whole record. We issue findings regarding employee's personal liability for certain medical bills. We also increase the compensation previously awarded.

PROCEDURAL HISTORY

This case has a long history as summarized below:

In early 1999, the administrative law judge heard this claim over the course of four days. On May 24, 1999, the administrative law judge issued an award of compensation after concluding that employee's exposure to chemicals while working for employer caused employee's pulmonary condition (asthma). On February 22, 2000, the Commission modified the award. On appeal, the Missouri Court of Appeals for the Western District of Missouri issued its mandate affirming the Commission's award of permanent partial disability but reversing the Commission's decision regarding past medical expenses. The Court remanded the matter to the Commission with directions to determine the proper amount of past medical benefits to be awarded to employee.

On December 6, 2001, the Commission issued an order determining the issue of employee's entitlement to past medical expenses, awarding to employee \$118,581.99. The matter was again appealed to the Missouri Court of Appeals. Upon application for transfer from the Court of Appeals decision, the case was transferred to the Missouri Supreme Court on March 11, 2003. On August 15, 2003, the Missouri Supreme Court issued its mandate reversing the Commission's December 6, 2001, award and decision, and remanding the matter to the Commission for further proceedings in conformity with the opinion of the Supreme Court dated July 29, 2003. Specifically, the opinion stated:

The Commission's decision is reversed, and the case is remanded for a determination of Ms. Farmer-Cummings' continuing liability for any of the past medical expenses at issue. If Ms. Farmer-Cummings remains personally liable for any of the reductions, she is entitled to recover them as "fees and charges" pursuant to section 287.140. If any of the reductions resulted from collateral sources independent of the employer, they are not to be considered pursuant to section 287.270, and Ms. Farmer-Cummings shall recover those amounts. However, if Personnel Pool establishes by a preponderance of the evidence that the healthcare providers allowed write-offs and reductions for their own purposes and Ms. Farmer-Cummings is not legally subject to further liability, she is not entitled to any windfall recovery.

Farmer-Cummings v. Personnel Pool of Platte County, 110 S.W.3d 818 (Mo. 2003)

By order of remand dated September 10, 2003, the Commission remanded the matter to the Division of Workers' Compensation (Division) to take additional evidence on past medical expenses. While the matter was on remand, employee filed a Motion to Review and Change Award pursuant to section 287.470 RSMo. On December 23,

2003, the Commission issued a second order of remand directing the Division to take evidence on the allegations in employee's motion.

DISCUSSION

Past Medical Expenses

The Supreme Court held that employee is not entitled to recover any portion of the \$118,581.99 for which she is no longer personally liable. We have reviewed the transcript of the remand hearing. Based upon the testimony and evidence presented, we conclude that employer has shown by a preponderance of the evidence that the following healthcare providers allowed write-offs and reduction for their own purposes and employee is not legally subject to further liability to the below-mentioned providers.

A. Established through live testimony:

- St. Luke' Health System, including St. Luke's Health System and St. Luke's Northland (Tr. 13)
- Midwest Pulmonary Consultants, PC (Tr. 15)
- Aggarwal Allergy Clinic (Tr. 150)
- Jackson County Pulmonary (Tr. 153),
- Diagnostic Imaging Centers (Tr. 159)
- Drisko Fee & Parkins (160)
- Dr. Mark Devine (162)
- MAST Ambulance (Tr. 164)
- Dr. Guastello, Dr. Guastello, and Dr. Jernstrom (Tr. 172)
- Cameron Regional Medical Center (Tr. 175)
- Old Westport ENT and Allergy, including Dr. Michael F. Hughes (Tr. 183)
- Dr. John Campobasso and Dr. James Marx (Tr. 187)
- Northland Radiology (Tr. 189)
- Swope Health Services, including Dr. Turner (Tr. 192)

B. Established through business records:

- Dr. Robert Littlejohn (Tr. 194, 611)
- Northland General Surgery (Tr. 198, 615)
- North Kansas City Hospital (Tr. 199, 622)
- Pulmonary Medical Association (Tr. 200, 625)

We conclude that employer/insurer has not established by a preponderance of the evidence that the following healthcare providers allowed write-offs and reduction for their own purposes. Accordingly, we conclude that employer/insurer has not shown that employee is not legally subject to further liability to the below-mentioned providers. Pursuant to the Supreme Court mandate, employee is entitled to recover these as fees and charges pursuant to section 287.140 RSMo.

C. Bill still due provider as established by live testimony:

- Liberty Hospital (Tr. 178) (\$573.69 for 12/1/96)

D. The following providers, though duly served with subpoenas, did not appear at the hearing.

- Truman Medical Center (Tr. 195)
- Dr. Ryan Reynolds (Tr. 199)

At the hearing, employer/insurer requested that the Commission hold these providers in contempt. Employer/insurer did not address this request in its brief and we consider it abandoned.

In addition to the \$118,581.99 previously awarded (which amount is now reduced as discussed above), employee asks this Commission to award the additional sum of \$24,428.35 as reflected in Claimant's Exhibit No. D. Exhibit D is a Release of Lien from the State of Missouri, Department of Social Services, Division of Medical Services for Medicaid payments made to providers. Employer responds that the amount paid by Medicaid is already included in the \$118,581.99 (now reduced).

We have no authority to consider employee's claim for additional past medical expenses. Any such award would be beyond the scope of the Supreme Court mandate.

Change of Condition

Section 287.470 RSMo, provides:

Upon its own motion or upon the application of any party in interest on the ground of change of condition, the commission may any time upon a rehearing after due notice to the parties interested review any award and on such review may make an award ending, diminishing or increasing the compensation previously awarded, subject to the maximum or minimum provided in this chapter, and shall immediately send to the parties and the employer's insurer a copy of the award. No such review shall affect such award as regards any moneys paid.

Below is a summary of what must be shown to establish a change of condition warranting an increase in compensation under section 287.470:

"In order to obtain an increased award upon the grounds of change of condition, the employee must show that since the original award his condition has become substantially worse." "A continued incapacity of the same kind and character for which an award has been made is not a change in condition warranting a modification of the award." Rather, the employee must show "that since the time of the rendition of the original award his condition has become substantially worse, and not that it has in fact always been worse than the commission happened to have found it to be."

Pratt v. MFA, Inc., 67 S.W.3d 697, 700-701 (Mo. App. 2002) (citations omitted).

Dr. David Hof, M.D., pulmonary specialist, began treating employee in 1995. During the period Dr. Hof has treated employee, employee's work-related pulmonary condition frequently had to be treated with corticosteroids, because they were the only medications that would sufficiently reduce employee's inflammation. On many occasions, the steroids were necessary to save employee's life. At the time he gave his deposition testimony prior to the 1999 hearing of this claim, Dr. Hof did not believe employee had suffered irreversible damage as a result of the steroids used to treat her work-induced asthma.

During his April 6, 2005, deposition, Dr. Hof explained in great detail why he believes employee has now suffered a severe worsening of her physical condition due to her treatment with steroids. Dr. Hof testified that employee belongs to a sub-population of individuals that have a hypersensitivity to steroids. Dr. Hof testified that by November 1999 employee began developing overt diabetes, which condition worsened over the next year. Dr. Hof explained that steroids interfere with the insulin receptors on the cells, so that insulin does not work very well. As a result, steroids make it difficult to control blood sugars. Employee's weight plummeted from 146 pounds to 100 pounds. By May 2001, employee was insulin-dependent.

Dr. Hof testified within a reasonable degree of medical certainty that the steroid treatment was reasonable and necessary to treat employee's asthma and that the steroid treatment has caused employee to suffer premature diabetes, cataracts, osteoporosis, and demineralization of her bones including her mandible. The osteoporosis and demineralization caused employee's teeth to rot and break exposing nerve endings. The pain limited employee to eating small amounts of soft food. Employee's inability to eat led to poor nutrition. Due to her diabetes combined with her thin stature, employee now suffers from peripheral neuropathy, which Dr. Hof also causally relates to employee's work-related asthma. Dr. Hof believes that employee is permanently and totally disabled from maintaining gainful employment.

Dr. Thomas Beller, M.D., testified on behalf of employer/insurer. Dr. Beller practices in the areas of pulmonary medicine and critical care. Dr. Beller examined employee on July 7, 2005, at which time he performed a physical examination. Dr. Beller's staff performed lung capacity testing and a chest x-ray. Dr. Beller concluded that employee had moderate asthma, as well as, type I diabetes, rhinitis, GRD, peripheral neuropathy, and cataracts. Dr. Beller acknowledged that steroids elevate blood sugar and interfere with diabetes management and that high

steroid use can cause demineralization, cataracts, and diabetes. Dr. Beller believes employee's steroid use caused her cataracts. Dr. Beller believes employee's diabetes probably caused her peripheral neuropathy. Dr. Beller was unaware of employee's dental and vision problems and he had not reviewed any records regarding osteoporosis, demineralization. Dr. Beller assessed employee's pulmonary disability at 40% of the body as a whole. Dr. Beller did not testify regarding whether employee's condition had worsened since the award in this case.

Dr. Hof has treated employee for over ten years and is intimately familiar with her conditions, diagnoses, treatment, and health over that period. He physically examined employee and observed employee before and after the entry of the award. Dr. Hof is undoubtedly in the best position to know if employee's physical condition has worsened since the entry of the award. Accordingly, Dr. Hof is the most credible medical expert to offer evidence in this matter. Dr. Hof described causally related deteriorations of structures and functions completely distinct from the pulmonary condition that was the basis for the original award of disability. Dr. Hof testified that these conditions were not anticipated at the time of the entry of the original award. Dr. Hof believes employee's condition has become "substantially worse" since he testified before the trial of this claim. We accept his testimony.

Employee has established that since the entry of the May 24, 1999, award of the administrative law judge, her condition has become substantially worse and she is entitled to an increase in compensation.

Employee alleges her condition has changed such that she is now permanently and totally disabled.

[T]he term "total disability" is "defined as the inability to return to any employment and not merely the inability to return to the employment in which the employee was engaged at the time of the accident." § 287.020.7. "It does not require that the claimant be completely inactive or inert."

"To determine if claimant is totally disabled, the central question is whether, in the ordinary course of business, any employer would reasonably be expected to hire claimant in his present physical condition."

. . . .

"The testimony of . . . lay witnesses as to facts within the realm of lay understanding can constitute substantial evidence of the nature, cause, and extent of the disability, especially when taken in connection with, or where supported by, some medical evidence."

Pavia v. Smitty's Supermarket, 118 S.W.3d 228, 234 (Mo. App. 2003) (citations omitted)

[T]he Commission does not have to make its decision only upon testimony from physicians; it can make its findings based on the entire evidence. "In determining the percentage of disability, the Commission is not bound by the percentage estimates of medical experts and it may consider all of the evidence, including the testimony of the employee and all reasonable inferences."

Pavia, 118 S.W.3d at 239 (citations omitted).

Employee testified that she would not be able to maintain employment because she would miss too much work due to illness. Employee explained that at times, her school-aged children have to take care of her. Dr. Hof described multiple hospitalizations employee has endured due to the complications of her steroid-induced conditions. Dr. Hof testified within a high degree of medical certainty that employee is totally disabled from any gainful employment. Dr. Beller offered an opinion that employee would be able to work with restrictions but Dr. Beller's opinion is of no assistance in our determination because Dr. Beller admittedly based his disability opinion solely on employee's pulmonary condition. Employee's claim for additional compensation is founded upon her allegations that her overall physical condition has deteriorated due to the many conditions she developed as a result of her steroid treatment.

Employer offered the testimony of Jennifer Parker, vocational expert. Ms. Parker never met employee. Ms. Parker performed no intellectual evaluation of employee. Ms. Parker reviewed only a fraction of the medical

records related to employee's medical conditions. Based upon the limited record review described, Ms. Parker identified one position she believes employee can perform within her physical restrictions. Ms. Parker had not checked to see if that one position was available in Kansas City, Missouri, but she thought it was available everywhere. In light of the cursory review performed by Ms. Parker, we accord her vocational opinion no weight. We note, however, that even if Ms. Parker had performed a thorough evaluation and review, the identification of one potential position does not defeat a finding that employee is unemployable in the open market.

By award dated May 24, 1999, the administrative law judge determined employee was 80% permanently and partially disabled due to her pulmonary condition. The evidence before us reveals that employee now suffers from the additional disabling conditions of uncontrollable diabetes, peripheral neuropathy, vision problems, demineralization, osteoporosis, and nutritional problems.

Having considered all of the evidence, including the testimony of employee and all reasonable inferences, we conclude that no employer in the ordinary course of business would reasonably be expected to hire employee. Employee is permanently and totally disabled as of November 17, 2003, the date Dr. Hof issued his opinion regarding employee's permanent disability after considering employee's new conditions.

AWARD

Pursuant to the Supreme Court mandate, the award of past medical expenses in the amount of \$118,581.99 is reduced by the amount of the expenses awarded for the health care providers identified in subsections A and B under the heading Past Medical Expenses. Such expenses are identified in Exhibits KK to the Commission's December 6, 2001, Award.

Pursuant to section 287.470 RSMo, we increase the award of permanent disability previously awarded in this matter to an award of permanent total disability. Employer shall pay to employee \$113.33 per week, commencing November 17, 2003, for her lifetime or until modified by law.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 7th day of June 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee:

Tracy Farmer

Injury No. 91-193274

Dependents: N/A

Employer: Alleged: Personnel Pool (1)
Alleged: Future Foam (2)

Additional Party: N/A

Insurer: (1) Liberty Mutual
(2) Hartford Insurance Company

Hearing Date: February 24, 1999/February 25, 1999
KJC/cms February 26, 1999/March 1, 1999
Briefs Filed April 16, 1999

Checked by:

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: October and November 1991
5. State location where accident occurred or occupational disease was contracted: North Kansas City, Clay County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes, see additional Findings of Fact and Rulings of Law.
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Employee while in the course and scope of her employment as a factory worker for Personnel Pool and Future Foam was required to glue, cut and drill hoes in foam. As a result of being exposed to TDI during the course and scope of her employment she contracted an occupational disease.
12. Did accident or occupational disease cause death? No Date of death? N/A

Employee: Tracy Farmer Injury No. 91-193274

13. Part(s) of body injured by accident or occupational disease: Lungs and respiratory system
14. Nature and extent of any permanent disability: Class 4 Asthma
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? None

17. Value necessary medical aid not furnished by employer/insurer? See additional Findings of Fact and Rulings of Law.
18. Employee's average weekly wages: \$170.00
19. Weekly compensation rate: \$113.33
20. Method wages computation: By Agreement

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses: See Additional Findings of Fact and Rulings of Law

N/A weeks of temporary total disability (or temporary partial disability)

320 weeks of permanent partial disability from Employer at 113.33 per week (\$36,265.60)

N/A weeks of disfigurement from Employer

Permanent total disability benefits from Employer beginning N/A, for Claimant's lifetime

22. Second Injury Fund liability: N/A

weeks of permanent partial disability from Second Injury Fund

Uninsured medical/death benefits

Permanent total disability benefits from Second Injury Fund:

weekly differential payable by SIF for weeks beginning
and, thereafter, for Claimant's lifetime

TOTAL: See Additional Findings of Fact
and Rulings of Law

23. Future requirements awarded:

Said payments to begin as of the date of the award and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25 percent of all payments hereunder including those for future medical treatment in favor of the following attorney for necessary legal services rendered to the claimant: Kevin Myers

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Tracy Farmer Injury No: 91-
193274

Dependents: N/A

Employer: Alleged: Personnel Pool (1)
Alleged: Future Foam (2)

Additional Party:N/A

Insurer: (1) Liberty Mutual
(2) Hartford Insurance Company

Checked by: KJC/cms

Prior to the hearing, the parties entered into certain admissions and stipulations. The remaining issues were as follows:

1. Whether the employee sustained an accident, series of accidents, and/or occupational disease arising out of and in the course and scope of her employment;
2. Notice;
3. The nature and extent of the disability sustained by the employee;
4. Whether Personnel Pool or Future Foam were liable for benefits either individually or jointly;
5. Liability for past temporary total disability benefits for the period January 20, 1998, to the present and into the future as the evidence might show;
6. Liability for \$174,007.57 in past medical aid;
7. Liability for future medical aid; and,
8. Whether either employer were entitled to a credit or whether they had a subrogation interest in the \$50,000 the employee recovered as a result of her March 1994 hospitalization at St. Luke's Hospital.

At the hearing, Ms. Tracy Farmer-Cummings (hereinafter referred to as claimant) testified that she was born on July 13, 1972. She stated that her last day of employment was January 19, 1998.

Claimant testified that prior to her employment at the Future Foam plant in October 1991, she had no trouble breathing, nor any hay fever, allergies or asthma symptoms. She stated that she had not been diagnosed with nasal polyps, sinus problems or aspirin sensitivity prior to October 1991.

Claimant testified that she was first hospitalized for any breathing or asthma problems in November 1991. She stated that she was diagnosed with asthma in May 1992. She also stated that she had experienced numerous asthma attacks since November 1991.

Claimant testified that she now had allergies to grass, trees, chocolates, aspirin and dogs and cats. She stated that she had been hospitalized about twenty times for asthma since she left her employment at the Future Foam plant.

Claimant testified that she had sinus surgeries in 1994, 1996, and 1998. She stated that she had been intubated in the hospital on two occasions after she was given aspirin-based medications and once put on life support.

Claimant testified that she takes over thirty different types of prescription medications for her respiratory problems. She stated that the steroids caused numerous side effects and resulted in severe and violent mood swings.

Claimant testified that she smoked less than one pack of cigarettes per day from the age of fourteen until 1992 when she stopped smoking. She stated that she now occasionally smokes a cigarette and that both her mother and sister also had asthma.

Claimant testified that she began work at the Future Foam plant on October 16 or 17, 1991. She stated that she was hired by Personnel Pool to fill a temporary position at Future Foam and that her paychecks came from Personnel Pool. She stated that she understood that she was to work at Future Foam as long as she was needed on the job.

She stated that her first job at Future Foam was to glue boat seats together and that she glued about 500 such seats per day. She indicated that after the seats were glued, they were stacked directly behind her workstation. She stated that fumes were emitted by the glue and that she wore no respiratory protection while gluing the seats, nor any aprons or gloves.

In addition to gluing the boat seats, Claimant testified that she also cut foam and drilled holes in it. She stated that the foam dust was so thick that the work area sometimes looked hazy from the foam dust particles.

Claimant testified that she got foam dust on her hands, forearms, clothes, and in her

shoes. She stated that she would itch from the foam dust. She stated the dust would stick on her clothes due to the glue.

Claimant further testified that she got foam dust in her hair and in her nose. She stated that when she blew her nose she would notice different colors of particles on her Kleenex. She stated that the color of the particles was the same as the color of the foam she was cutting during the day.

Claimant testified that she began developing health problems around November 1991. She stated that initially she noticed a rash on her left forearm in the area where dust often stuck due to the glue. She stated that on November 6, 1991, she was admitted to the hospital with what she thought was a bad chest cold. She stated that she was hospitalized for three or four days with severe breathing problems.

Claimant indicated that her cold type symptoms lasted for close to two weeks. She stated that she returned to work on November 13, 1991, and that after about five hours she began having difficulty with her breathing and experienced cold sweats. She stated that two days later when she returned to work on November 15, 1991, her physical problems got worse. She related that she became severely short of breath, turned white, and asked a coworker to take her home. She stated that she never returned to her job at the Future Foam plant after that date.

Claimant identified medical bills in the amount of \$174,007.57. She related that most of the bills were for treatment directly related to her respiratory problems. She indicated that some of the bills were for her pregnancy, which had to be closely monitored due to her respiratory problems. She indicated that in April 1993 she was involved in a car accident and became hysterical and experienced a severe asthma attack. She admitted that in the summer of 1996 she was admitted to the hospital after an asthma attack while she was on a camping trip.

Claimant admitted that subsequent to her employment at the Future Foam plant she worked on several jobs. She admitted that in 1992 she worked at Taco Bell and later as a cashier at Conoco. She admitted that she was exposed to fumes while working on the job at Conoco.

She testified that in 1993 she worked as a cashier at Phillips 66. She related that later she took a job at Quick Delivery Services where she worked as a driver. She admitted that she was exposed to car fumes on that job. She stated that she was pregnant during the remainder of the year and did not work.

Claimant testified that in 1994 she was enrolled in school and did not work. She stated that in 1995 she worked for Accent Teller Services as a telemarketer. She stated that she worked on that job until April 1996. She indicated that during the same time period she worked part-time at Sonic Drive In.

Claimant testified that in 1996 she worked for S & S Meat Company as a receptionist. She stated that she worked about six months on that job. She stated that during the same time period she worked part-time at Wal-Mart and later at Dollar General Store.

Claimant testified that toward the end of 1996 she was hired at TransWorld Airlines through a temporary service. She stated that her job was accountant investigator in the Administration Building. She stated that she had numerous absences while on her job at TWA. She stated that she last worked for TWA in December 1997 and resigned effective in January 1998.

Claimant also testified that she missed numerous days from work during the period 1992 through 1997. She stated that she had numerous emergency room visits during that period and several hospitalizations. She stated that in July 1997 TWA put her on probation for attendance. She admitted that she was removed from probation during the following month.

Claimant testified that her jobs prior to the one at the Future Foam factory were primarily in the fast food field while she was a teenager. She indicated that her prior jobs were at Big Burgers, Taco Bell, and Ponderosa.

On cross-examination by Personnel Pool, Claimant testified that she was currently twenty-six years old. She admitted that she only worked at the Future Foam warehouse for four weeks. She admitted that most of her work days were six and a half to seven hours and that she only worked one day for more than eight hours.

Claimant testified that all the equipment she used on the job at Future Foam was furnished by Future Foam. She stated that Future Foam controlled the means of her work. She stated that Future Foam directed her as to what to do. She stated that her supervisor was an employee of Future Foam and that her supervisor told her what to do. She stated that if she left work early she had to report to both Future Foam and Personnel Pool.

Claimant testified that if she did not do her job properly Future Foam could call Personnel Pool and tell them not to send her back. She indicated that it was her understanding that Future Foam could fire her. She stated that she worked on the premises of Future Foam. She stated that the work she did for Future Foam was what it did in the normal course of its business.

Claimant was also confronted on cross-examination by Personnel Pool with some of her past medical records. She was confronted with records from November 1991 which pertained to her initial hospitalization following her employment at the Future Foam factory. She acknowledged that the records stated that she had been prescribed Theo-Dur and an inhaler about a year earlier. She admitted that in 1987 she went to an emergency room for a cat bite and that the records showed that she was taking medication for asthma-type symptoms. She admitted that in 1989 she was hospitalized at the Tri-County Mental Hospital, whose records showed that she was taking Alumex and using an inhaler.

Claimant, however, denied the accuracy of each of the records. Similarly, she denied that she told any doctor at North Kansas City Hospital in November 1991 that she was aspirin sensitive.

Claimant admitted that she never told anyone at Personnel Pool that she had been exposed to something at Future Foam which caused an asthma attack. She admitted that she never told anyone at Future Foam that she was alleging that she had suffered an occupational disease due to her employment at the Future Foam plant. She admitted that she never asked for medical treatment from anyone at Personnel Pool.

Claimant admitted that during most of her hospitalizations for the asthma-related symptoms she was employed at companies other than Personnel Pool or Future Foam. She admitted that during the hospitalizations she was working for places like Taco Bell, Conoco, and Phillips 66 where she was exposed to various fumes.

Claimant also admitted that from December 1991 until December 1997 she worked at various jobs. She admitted that during part of the time when she was not working, she received unemployment compensation. She admitted that on one occasion she stopped working in 1993 after she was involved in a car accident and found out that she was pregnant.

Claimant admitted that in March 1993 she was intubated at St. Luke's Hospital after being given an aspirin-based medication. She admitted that she received a \$50,000 settlement from the hospital. She admitted that from January to November 1994 she was a full-time student at school.

Claimant admitted that at age sixteen she received counseling for psychological problems and that she was diagnosed as being manic-depressive. She admitted that her

mother "kicked" her out of the house at age sixteen. She admitted that afterwards her father and stepmother "kicked" her out of the house. She admitted that she had suicidal thoughts at that time. She admitted that she became a patient at the Tri-County Mental Health Center at age sixteen.

Claimant admitted that she resigned from her job at TransWorld Airlines in January 1998 and that she began receiving SSI disability benefits in February 1998. She admitted that she had not applied for any jobs since she began receiving the disability benefits.

Claimant admitted that she had begun a new treatment program with Dr. Hof in June 1998. She stated that he began prescribing new medications in August 1998. She stated that Dr. Hof weaned her off the oral steroids.

She admitted that she lost 30 pounds after getting off the steroids. She acknowledged that Dr. Hof had stated that her mood swings had stabilized and that she had improved significantly since she stopped taking the steroids. She stated that she disagreed with that conclusion.

Claimant admitted that she could take care of her five-year-old son and her husband's three and five-year-old daughters. She admitted that she was able to cook. She admitted that she did the family's laundry. She admitted that she was able to go grocery shopping.

Finally, Claimant acknowledged that Dr. Hof had stated that she, Claimant, would be able to go back to work full-time on the new treatment program. In addition, she was confronted with her October 15, 1991, application for employment with Personnel Pool which showed that she had checked the box which stated that she had asthma. Claimant denied that she checked the box.

On cross-examination by Future Foam, Claimant admitted that Personnel Pool paid her. She stated that she did not get a W-2 from Future Foam. She said that she did know on what account she drew her unemployment compensation.

Claimant admitted that she never asked Future Foam to pay her hospital or doctors' bills. She admitted that she never discussed a workers' compensation claim with Future Foam.

The medical evidence consisted of numerous depositions, reports and records. The videotaped deposition of Dr. Glenn Parmette was offered into evidence by Claimant. Dr. Parmette testified that he was board-certified in both occupational and aerospace medicine and that he was a Ph.D. candidate in toxicology. He stated that he retired from the Air Force in 1992 and that he had published numerous articles on toxicology. He also stated that he teaches toxicology for the Air Force and that he had previously taught courses on chemical exposures.

Dr. Parmette testified that he personally examined Claimant and reviewed her numerous medical records. He stated that her medical records prior to her employment at the Future Foam factory showed that she was on drugs which were used for the mildest grades of asthma or for bronchitis. He indicated that the history Claimant provided to him was classic for isocyanate exposure. He noted that Claimant gave a history of being exposed at work and then off work and that when she returned to work she experienced immediate symptoms. He stated that such a history was classic for isocyanate exposure.

Dr. Parmette indicated that during his physical examination of Claimant she had very loud and consistent wheezing. He stated that he did not observe any polyps. He stated that pulmonary function studies showed that her total lung volume capacity was 54 percent of normal.

Dr. Parmette concluded that Claimant had both restrictive and obstructive lung disease. He diagnosed her condition as occupationally-induced asthma due to her exposure to

isocyanates at Future Foam. He stated that her asthma was Class 4 and very severe on an intermittent basis and totally disabling. He stated that the Class 4 asthma resulted in a permanent partial disability of 80 percent to the body as a whole. He stated that Claimant did not have any disability from her preexisting Class 1 asthma.

Dr. Parmette also testified that an extremely small amount of exposure to isocyanates could cause sensitization. He indicated that five parts per billion exceeded the safe limits for isocyanate exposure in the work place. He indicated, however, that the five parts per billion pertained to exposure through the skin and that it was possible that the limits for exposure through the air could be smaller than the five parts per billion.

Finally, Dr. Parmette concluded that Claimant would not be employable in the future because she was "very brittle." He stated that Claimant was permanently and totally disabled and that she certainly could not do any type of physical labor jobs. He also stated that while she was limited to clerical jobs, she would have a problem in doing that type of work due to the amount of time she would miss from work to receive medical treatment.

On cross-examination by Personnel Pool, Dr. Parmette admitted that Claimant's numerous allergies indicated that she had a genetic predisposition to asthma. He acknowledged that cured foam should not have contained any toluene diisocyanates (TDI). He stated that aspirin sensitivity was common with different types of asthma. He stated that TDI could cause different types of asthma. He stated that aspirin sensitivity had almost no bearing on whether a person's asthma was caused by TDI exposure or anything else. He stated that nasal polyps were not unique to isocyanate exposure or any other type of asthma. Finally, he admitted that he believed that Claimant could work when she was feeling good.

On cross-examination by Future Foam, Dr. Parmette admitted that the primary means of getting sensitized to TDI would be through vapor exposure. He stated that although he was not aware of any Air Force studies on the release of TDI from cured foam, he personally knew of one such case.

Dr. Parmette admitted that in concluding that TDI was trapped in the foam he had relied totally on the studies from the Midwest and Fayette Laboratories. He admitted that he ran no tests to validate the conclusions of the laboratories. He admitted that asthma was usually a very progressive disease and that it was difficult to explain why Claimant had such a severe reaction.

On redirect examination, Dr. Parmette indicated that although he had rated Claimant as being 80 percent permanently and partially disabled he believed that she was precluded from performing substantial gainful activity.

The videotaped and a subsequent written deposition of Dr. David Hof were offered into evidence by Claimant. He testified that he was board certified in internal and pulmonary medicine. He stated that he had held an academic position at the University of Minnesota and that he currently taught at the University of Missouri at Kansas City Medical School and at St. Luke's Hospital. At the time of his videotaped deposition, he stated that he had evaluated Claimant on October 5, 1995, and April 17, 1998.

Dr. Hof stated that Claimant's blood pressure, pulse, and respiratory rates were normal. He stated that she had some wheezing at the end of her respiratory cycle and that the results from her respiratory tests were abnormal.

Dr. Hof diagnosed Claimant's condition as severe and intractable asthma. He stated that her asthma did not appear to be completely reversible and that Claimant might have some small airway obstruction.

He concluded that something in Claimant's work environment had caused her respiratory problems. He noted that it was significant that she had no history of triad asthma before the attack in November 1991. Thus, he concluded that Claimant had occupationally induced asthma caused by a chemical irritant.

Dr. Hof indicated that Claimant's condition had deteriorated by April 1998. He noted that her forced expiratory volume test results in 1998 were 65% of predicted as opposed to 85% of predicted in 1995.

Dr. Hof concluded following the April 1988 examination that Claimant was 100 percent disabled. [1] He stated that it would be difficult for Claimant to be a reliable worker because some type of exposure might throw her into respiratory distress. He indicated that Claimant's ability to work would be inhibited by her arduous medical program, consisting of numerous medical visits. He further indicated that she would need a job which provided medical insurance.

Finally, Dr. Hof indicated that if a person had a rash, it would break down the skin barrier and make it easier for a chemical such as isocyanates to be absorbed into the body. He stated that isocyanate exposure through the skin could cause an airway sensitization. He stated that Claimant's sensitization could have been caused by isocyanates or some other chemical at work. He indicated that it was likely caused by isocyanates.

Dr. Hof indicated that Claimant would require future medical treatment due to her asthma. He stated that she might require a lung transplant at some point in the future.

On cross-examination by Personnel Pool, Dr. Hof indicated that isocyanates had never been reported to cause asthma sensitivity. He admitted that several other chemicals besides TDI could cause problems such as those complained of by Claimant.

The second and written deposition of Dr. Hof was taken in February 1999. Much of it was cumulative of the first deposition. During the second deposition, however, he testified that he had seen Claimant five times since April 1998. He stated that he had taken over her primary care in June 1998. He stated that in August 1998 he had placed Claimant in a new aggressive program to treat her asthma. He stated that under the new program Claimant was taken off the steroids and that she seemed to be getting better and that she looked good.

Finally, Dr. Hof testified that most of Claimant's medical bills were reasonable and her therapy appropriate. He indicated some uncertainty as to how Claimant's C-section or the delivery of her baby was related to the work injury. He was also not definitive in his discussion as to how the medical bills subsequent to Claimant's car accident were related to her alleged work injury or exposure.

On cross-examination by Future Foam, Dr. Hof testified that he believed that Claimant had not suffered irreversible damage by the steroids. He stated that he believed that if he could keep Claimant on his treatment program she would go into remission. He admitted that he believed that if Claimant continued on his program there was a good chance that she would be able to go back to work in a clean office environment by June 1999.

On redirect examination, Dr. Hof indicated that Claimant was currently disabled from substantial gainful employment. He stated that he could not guarantee that Claimant would get better, but that he believed that she would probably improve.

Dr. Gerald Kerby, board-certified in internal medicine, pulmonary diseases, and critical care medicine, testified on Personnel Pool's behalf. He stated that he was a full Professor of Medicine at the University of Kansas Medical Center and that he had his own private practice. He stated that he examined Claimant on March 5, 1996.

Dr. Kerby noted that Claimant told him that the foam she worked with was not melted or cut with a hot wire or heated to the point where it produced fumes. He stated that she told him that the foam was cut with a cold knife.

Dr. Kerby noted that Claimant had cushingoid features, which was evidence of corticosteroid use. He stated that forced vital capacity testing showed that the total amount of air which Claimant could inhale after a maximal effort was 3.76 liters which was 94 percent of predicted. He indicated that she could exhale 2.49 liters, which was 71 percent of the predicted normal.

Dr. Kerby related that the medical records suggested that Claimant's asthma problems pre-existed her alleged exposure at the Future Foam factory. He concluded that Claimant had severe asthma. He rated her

permanent partial disability using the AMA and American Thoracic Society Guides at 70 to 80 percent.

Dr. Kerby further testified that Claimant had triad asthma which was characterized by aspirin sensitivity and nasal polyps. He stated that although he had rated Claimant's permanent partial disability at 70 to 80 percent, none was attributed to the alleged 1991 exposure at the Future Foam factory.

Finally, Dr. Kerby testified that there were no cases in the medical literature where a person had nasal polyps with asthma caused by TDI exposure. He stated that vapor inhalation was the only way to become sensitized to TDI. He also stated that it had never been reported that a human being became sensitized by touching foam.

On cross-examination by Claimant, Dr. Kerby disputed the allegation that Claimant had developed a rash around October or November 1991. He stated that Dr. Campobasso's records referred to one single red spot on Claimant's wrist. He stated that a rash required more than one spot. He also stated that while isocyanates could cause a rash, they did not cause allergic sensitization via the skin.

Dr. Kerby admitted that 2 to 5 percent of people exposed to isocyanates become sensitized. He admitted that up to 5 percent of people with a significant exposure might develop asthma.

Dr. Kerby admitted that he would expect free TDI to be extracted from all pieces of foam analyzed because foam was made of TDI. He reiterated that skin exposed to isocyanates could result in skin sensitization, but not respiratory sensitization. He stated that there was no documentation that skin exposure could cause respiratory problems.

The remaining numerous medical reports and records were essentially cumulative of the testimony.

Mr. Wilbur Swearingin, a certified rehabilitation counselor with an office in Springfield, Missouri, testified at the hearing on Claimant's behalf. He stated that he had a bachelor's degree in education from Southwest Missouri State and some training in rehabilitation with the Missouri Division of Rehabilitation. He stated that most of his clients were Claimants involved in some type of litigation.

Mr. Swearingin testified that he evaluated Claimant on October 7, 1998. He stated that his evaluation involved tests, a personal interview, and a review of medical records.

He stated that testing showed that Claimant had a good academic ability with most of her aptitude scores at the 75 percentile, meaning that she did better than seventy-five out of one-hundred people who took the test. He also stated that she had good dexterity and mechanical ability.

Following a hypothetical question, which asked Mr. Swearingin to assume Claimant's age, education, employment history, and her medical records, he stated that Claimant could not do gainful employment on a regular basis. He stated that she could do irregular jobs. He stated that she would be more employable in the summer when the weather was dry. He stated that she had employability problems more so than placeability problems. He stated that she had the ability to get jobs when she was feeling well. He also noted, however, that a significant factor was that if Claimant obtained a job she would lose her Medicaid, Medicare, and social security disability benefits.

On cross-examination by Personnel Pool, Mr. Swearingin admitted that Claimant could work on an intermittent basis. On cross-examination by Future Foam, he admitted that he did not consider Claimant's age to be an important factor because she was under fifty. He admitted that he had based part of his opinion that Claimant could not work on a regular basis on the assumption that she might have trouble getting medical insurance if she went back to work.

In addition to the medical evidence, various other experts, including toxicologists, pharmacologists, chemists, and industrial hygienists testified either at the hearing or by deposition. Dr. Edward J. Walazek, a professor of pharmacology, toxicology, and therapeutics at the Kansas University Medical Center, testified by deposition on Claimant's behalf. He indicated that he had a Ph.D. degree from the University of Chicago

in pharmacology and toxicology. He stated that he spent two years at the University of Edinburgh in Scotland doing research on polytechs. He stated that he served as Chairman of the Department of Pharmacology and Toxicology at the University of Kansas from 1964 until 1992.

Dr. Walazek related that rashes were the most common types of sensitization. He noted that the respiratory system was another type of sensitization. He stated that isocyanates could cause a skin rash. He stated that either a respiratory or dermal sensitization could result in permanent asthmatic attacks. He emphasized that literature supported his opinion that sensitization through the skin could result in asthmatic attacks. In fact, he stated that dermal absorption was the main problem and that anyone who worked around isocyanates needed to cover their hands and other body parts.

Dr. Walazek testified that he did not have much faith in the so-called safety limits as far as exposure to isocyanates was concerned. He related that a person with dermatitis or a rash who worked around isocyanates would have an increased likelihood of exposure through the skin. He explained that the skin was a barrier and that if the person had dermatitis, the skin would lose many of its protective devices.

Finally, Dr. Walazek testified that he believed that Claimant became sensitized by a dermal exposure. He indicated, however, that it was possible that she was exposed both dermally and through the respiratory system.

Mr. Mark Lanz also testified at the hearing on Claimant's behalf. He stated that he was the lab director of Braun Intertec and that he had a bachelor's degree in chemistry. He also stated that he was a Certified Industrial Hygienist.

Mr. Lanz testified that he tested foam samples on January 15, 1999. He stated that the initial test was the tube furnace analysis in which the foam was heated to 400 degrees Fahrenheit in a furnace and then tested for off gassing of 2-4 and 2-6 TDI. He stated that Sample No. 1 contained 1,200 micrograms of 2-4 TDI per gram of foam and 230 micrograms of 2-6 TDI per gram of foam. He stated that Sample No. 2 contained 300 micrograms of 2-4 TDI per gram of foam and 180 micrograms of 2-6 TDI per gram of foam. He stated that Sample 3 contained 810 micrograms of 2-4 TDI per gram of foam and 230 micrograms of 2-6 TDI per gram of foam. He stated that the solid sample of foam had no TDI.

Dr. Theodore Goddish, Ph.D., testified by deposition on Claimant's behalf. He stated that he had three degrees from Penn State University with a major in plant science and a minor in air and environmental studies. He stated that he was certified as an industrial hygienist. He stated that he had published in his field.

Dr. Goddish testified that it was significant that Claimant saw pieces of foam dust or material on her Kleenex when she blew her nose. That, he stated, was a direct link in terms of exposure. He also indicated that it was significant that the room Claimant worked in had no ventilation, resulting in it being hazy with dust and that Claimant had to cut the foam into triangular type pieces. He stated that to get a triangular type piece more cuts to the foam were required, which led to a greater possibility for potential exposure to dust.

Dr. Goddish testified that based on the laboratory analysis, the foam Claimant worked on at Future Foam contained unreacted TDI. He stated that it was expected that unreacted TDI would be a component of the dust particles because a reaction is never 100 percent complete. He stated that literature on the subject supported his position.

Finally, Dr. Goddish testified that he had problems with the lab results from Chemir-Polytech. He noted that Chemir-Polytech only tested a single sample which was not good scientific practice. He noted that there was no indication that the methodology used by Chemir-Polytech for testing was accepted by any regulatory authority.

He also stated that 10 percent of the most sensitive people could become sensitized to TDI if a company complied with OSHA standards. He stated that OSHA standards were designed for reasonable, but not as an absolute protection.

Dr. Rhys Thomas, Ph.D., an analytical chemist, testified by deposition on two occasions on Claimant's behalf. He stated that he was supplied three trash bags of foam dust which he kept for five weeks and then

analyzed for TDI.

Dr. Thomas indicated that he added solvent to a sample of the dust and squished it 100 times. He stated that he then removed the solvent and analyzed the remaining liquid by gas chromatography (GC/MS) to identify whether any TDI was in the foam.

Dr. Thomas noted that his tests revealed TDI in the foam dust. He stated that he only tested for 2-4 TDI and that in the three samples he found 22.2 micrograms of TDI per gram of foam in the first sample, 20.5 micrograms and 18.9 micrograms of TDI per gram of foam in the second and third samples respectively.

Dr. Thomas testified that the TDI must have been on the inside of the foam because otherwise, due to its reactive nature it would have reacted with the air and other "stuff" in the environment. He stated that because the TDI was on the inside of the foam, it was protected in little foam pockets.

Finally, Dr. Thomas indicated that the results from the tests conducted by Claimant's alleged employers were skewed by several factors. He stated that the air sample test using an MDA instrument would not reveal an accurate amount of TDI. He stated that the MDA tested the air near the person's head. He stated that the MDA measured ambient air, but not that air directly exposed to the individual's head.

In the second deposition Dr. Thomas testified that he analyzed seven pieces of foam and tested each piece on two occasions. He stated that the samples tested came from the middle of the foam and that after converting the samples to liquid he analyzed it with the GC/MS or gas chromatograph or mass spectrometer. He stated that he tested for both 2-4 and 2-6 TDI, and found TDI in every sample tested in varying amounts.

Dr. Thomas testified that the samples tested revealed drastically different results, indicating that the TDI was in different pockets and not evenly distributed in the foam. He also noted that the 2-4 TDI was free, meaning that it was not partially reacted or decomposed in any manner.

Finally, Dr. Thomas testified that while he expected to find some TDI, he was surprised by the amount of it. He indicated that in one sample he found 51 micrograms of TDI per gram of foam and in another sample he found 17 micrograms of TDI per gram of foam. He stated that unreacted TDI in foam which was encapsulated by something could sit in the foam for years. He also stated that he used an EPA-approved method in performing his testing.

On cross-examination by Future Foam, Dr. Thomas admitted that he believed that if TDI was on the outside of the foam it would have reacted with the air while being transported from the manufacturing to the fabrication plant. He indicated that such TDI would have probably reacted by the time the foam reached the fabrication plant. He admitted that he did not know the dimensions of Claimant's work area or how well it was ventilated. He also noted that he did not know the amount of heat generated by the saw.

Ms. Candy Stark, an analytical chemist at Midwest Laboratory, also testified on Claimant's behalf. She stated that she worked in the chromatograph department where she had performed numerous experiments using the GC/MS machine. She admitted that she had no previous experience working with isocyanates.

Ms. Stark testified that she found both 2-4 and 2-6 TDI in most of the foam samples she tested. She stated that neither the 2-4 nor 2-6 molecules found were partially reacted. She stated that she found a smaller quantity of 2-6 than 2-4 TDI. She stated that the 2-4 TDI found in the samples averaged 30 to 40 parts per million, while the 2-6 TDI averaged 15 parts per million. She stated that there were 123.5 micrograms of 2-4 and 2-6 TDI per gram of foam.

On cross-examination by Future Foam, Ms. Stark admitted that she did not attempt to duplicate Claimant's work environment in performing the tests. She admitted that she reviewed the findings from Fayette Lab before she performed her tests. She stated that the HPLC machine was a detector and not an extractor of various chemicals from a product.

In addition to the medical and expert witnesses, Claimant offered into evidence the deposition testimony of

Mr. Robert Andrew Heller, the vice-president and business manager of Future Foam, and Mr. Pat Merrill, the plant manager of Future Foam in North Kansas City, Missouri. Their testimony was essentially cumulative of the other evidence.

Mr. Heller admitted, however, that to make the foam harder they changed the ratio of chemicals used to make it. He admitted that more TDI was put into the mixture to make the foam harder. He also admitted that one other employee of Future Foam who did not work in a fabrication facility complained of asthma symptoms.

Mr. Merrill testified that the company had masks available for the workers to use. He stated that hardly any dust was generated when the foam was fabricated. He stated that the company often used temporary employees from Personnel Pool and that if the temporary employees were good workers and if the company had openings they would hire them.

Ms. Manuella Cervantes, an assistant manager at Future Foam testified by deposition on Claimant's behalf. She stated that she worked at the company for eighteen years. She stated that employees did not wear masks or protection while cutting and gluing the foam. She stated that the company had masks available for its employees.

On examination by Future Foam, Ms. Cervantes testified that there were no fumes in the work place. She stated that the company had windows which were open for ventilation. She stated that she was not aware of any employee who complained about breathing problems. She stated that in 1991 no one used hot glue. She stated that in 1991 they used a spray nozzle to put the glue on the foam.

Claimant's alleged employer, Future Foam, offered into evidence the testimony of various expert witnesses. Dr. Herman Stone testified at the hearing on Future Foam's behalf. He stated that he had a BS degree in chemistry from Bethany College in West Virginia and a Ph.D. in physical organic chemistry from Ohio State University in 1950.

Dr. Stone related that he had extensive experience working in the polyurethane foam industry. He stated that he was previously in charge of research pertaining to foam at Allied Chemical, which was a major supplier of TDI and polyethers. He stated that he later worked for the Buffalo Research Lab, which had a division on TDI. He stated that in 1974 he became employed by General Foam Company, which manufactured polyurethane foam. He stated that he became the Director of Research for the company and that he now worked as a part-time consultant on his own and for General Foam Company.

Dr. Stone testified that to make flexible polyurethane foam various ingredients including TDI, water, polyether, coloring an emulsifier and some type of combustion modifier were put into a small mixing chamber which was temperature controlled. He stated that the ingredients would come out of the mixing machine and proceed down a conveyor where the water and TDI would continue to react. He stated that the conveyor was covered to prevent any TDI vapors from escaping into the plant area. He stated that when the reaction was complete, there would be no more TDI and that the foam later became a solid.

Dr. Stone testified that the TDI used in the mixture was a blend of the 2-4 and 2-6 isomers. He stated that both isomers had the same composition, but differed in their physical location in the isocyanates groups. He also stated that it was important to use the two different isomers because they reacted at different rates. He stated that commercial foam was about 80 percent 2-4 TDI and 20 percent 2-6 TDI.

Dr. Stone testified that the reaction occurred about two minutes after the ingredients were added into the chamber. He stated that the density or firmness of the foam depended on the amount of water added to the mixture.

Dr. Stone testified that about 98 percent of the TDI reacted in the first two minutes, and the remaining 2 percent reacted while the mixture was going down the conveyor. He stated that afterwards the foam was segregated into an area where no people worked and that while in that area it continued to react and get hotter.

Dr. Stone testified that 2-4 TDI was more reactive than 2-6 TDI and that therefore, as the foam went down the conveyor the ratio of 2-6 and 2-4 TDI might change from 20 percent 2-6 and 80 percent 2-4 to as high as 90

percent 2-6 and 10 percent 2-4. He reiterated that the finished product or foam would have no TDI.

Finally, Dr. Stone testified that there were major problems with the technology used to try to detect unreacted TDI. He stated that in trying to detect unreacted TDI in products, scientists were pushing the capabilities of modern science. He indicated that anytime a lab could not reproduce the same number in testing a sample that was a problem. He stated that in Claimant's case those labs employed by Claimant failed to produce the same numbers when they tested the samples.

He further indicated that one problem with the lab work in Claimant's case was that the results showed a greater percent of 2-4 TDI in the foam than 2-6 TDI. He stated that the results should have been the opposite because 2-4 TDI was much more reactive than 2-6 TDI. Thus, he stated that when lab results showed a higher percent of 2-4 than 2-6 TDI, something else had to be going on for the lab to get such results.

He stated that such results either meant that the samples were contaminated or that the thermal decomposition process had resulted in the unusual findings. He explained that thermal decomposition involved the process of heating a product to turn it into a liquid. He indicated that the high temperatures needed to break down the product and produce a liquid could cause unusual results in testing for TDI. He stated that if the results from the testing were accurate when the foam became liquid, the chemical bonding would have completely reversed and that there should have been an 80/20 ratio of 2-4 to 2-6 TDI.

On cross-examination by Claimant, Dr. Stone testified that he was aware of one case where a person who worked in the manufacture of foam complained of a respiratory problem or asthma. He admitted that he had spent his entire working career employed by the chemical industry. He admitted that in the making the foam companies sometimes put 20 percent more TDI into the mixture than was called for in the formula. He admitted that if the company put 30 percent more TDI into the formula than called for in the recipe, the TDI in the 130-index foam probably would not totally react. He admitted that there would possibly be free TDI in the foam if a 130 index for the TDI was put into the mixture to make the foam. He testified, however, that no company would use a 130 TDI mixture because such a high concentration of TDI would result in foam, which was not useable. He emphasized that the highest TDI index he had ever seen for foam was 120.

Mr. Lynn Knudtson, a chemist at Future Foam and formerly its regulatory compliance, and environmental, health and safety manager testified on its behalf. He stated that he was familiar with the manufacturing and curing process of foam and that although he did not work for the company in 1991, he understood that the foam was cured for 16-24 hours at that time. He also stated that in 1994 after he became aware of Claimant's workers' compensation claim he was requested by Rob Heller, the vice-president of Future Foam, to perform certain tests on the foam.

Mr. Knudtson testified that he tested for TDI using a monitor in the fabrication plant in Council Bluffs, Iowa, the corporate office, near the bun cutting machine and at the location where the foam was stored. He stated that the monitor could detect TDI at the level of one part per billion in the air. He stated that no TDI was detected at any location he tested.

In addition, Mr. Knudtson indicated that he checked the temperature on a band saw used at Future Foam. He related that the temperature of the saw's blade ranged from 60 to 69 degrees Fahrenheit or 25 degrees Celsius.

Mr. Knudtson testified that the temperature at which polyester foam began to decompose was at 300 to 350 degrees Fahrenheit. Thus, he indicated that the temperature of the band saw blade was nowhere near the temperature at which the foam would have begun to decompose or vaporize.

On cross-examination, Mr. Knudtson denied any knowledge of any OSHA inspections at Future Foam. He was then confronted with several alleged OSHA violations at various Future Foam factories and shown his picture in the OSHA records. He then acknowledged that Future Foam received a citation dated April 6, 1995, based on an improper concentration of 2-4 TDI in the atmosphere. He admitted that OSHA issued citations based on TDI being in the atmosphere at various locations at Future Foam plants. He admitted that in January 1995 there was a notation that both 2-6 and 2-4 TDI was in the grinding area. He admitted that in February 1995 OSHA issued a

citation showing that an employee working on the foam line had to enter a tunnel with TDI in the atmosphere. He admitted that OSHA issued a citation based on a saw operator on the foam line being exposed to some 2-6 and 2-4 TDI.

Mr. Knudtson admitted that in February 1995 OSHA had issued a citation for TDI in the atmosphere in the area where the saw operator worked. He admitted that OSHA found that a foam line laborer was exposed to TDI in the atmosphere. He admitted that OSHA found that the maintenance technician and mold machine operator were exposed to both 2-6 and 2-4 TDI in the atmosphere.

Mr. Knudtson admitted that on January 12, 1995, OSHA found that the carpet pad and foam from the used scrap foam area had 2-6 and 2-4 TDI. He admitted that OSHA had found that the grinder who had to push carts was exposed to 2-6 and 2-4 TDI.

On redirect examination Mr. Knudtson testified that he believed that the TDI exposure citations issued by OSHA were later dismissed. He stated that based on OSHA standards no employee was exposed to TDI above the allowable limits. He stated that OSHA found no TDI in some of the areas where employees worked.

Claimant's alleged employer, Personnel Pool, also offered the testimony of several experts. Dr. Wayne K. Way testified that he had a BS degree in chemistry from the University of Illinois and a Ph.D. in 1996 from Penn State University. He stated that he currently worked for Chemir-Polytech where he did research and managed three to five chemists.

Dr. Way testified that as part of his job he used a chromatograph machine to separate, identify, and quantitate the chemicals in a variety of matrixes. He stated that in Claimant's case he analyzed foam samples submitted by Personnel Pool.

Dr. Way testified that initially he cut a piece of foam from a larger sample and placed the smaller piece in methanol in an oven at approximately 38 degrees Celsius for 48 hours. He indicated that after 48 hours the foam sample was removed from the oven, and dried by heat to reconstitute it, and tested for TDI. He explained that TDI was a reactive material which when mixed with water would hydrolyze to become TDA. He stated that the TDA would have been TDI while in the foam. He stated that the TDA in the sample was approximately four parts per million for the 2-6 TDA isomer and .012 parts per million for the 2-4 TDA isomer.

Dr. Way testified that the second test involved a gas chromatograph machine. He stated that the liquid obtained from the initial testing was put into the machine and turned into gas. He stated that the results from the test failed to reveal any TDI. He stated that the lab only found methocarbonate, which resulted from the use of methanol as part of the test.

On cross-examination by Claimant, Dr. Way testified that they charged \$9,000 for the experiment. He admitted that the gas chromatograph machine confirmed that TDA was in the foam at the concentration of four parts per million. He admitted that the finding of four parts per million TDA would indicate that there was also four parts per million TDI.

Dr. Robert Short, a self-employed toxicologist, also testified on Personnel Pool's behalf. He stated that he had Ph.D. degree in Pharmacology and Toxicology from Michigan State University and that he had been self-employed for one year. He stated that he specialized in occupational toxicology and research.

Dr. Short testified that toxicology was the study of the adverse effects of chemicals. He stated that pharmacology was the study of how chemicals reacted to the body. He related that in Claimant's case he relied upon a study by Dow Chemical and performed a risk assessment based upon his review of Chemir-Polytech's testing. He stated that TDI in the amount of .005 parts per million in the air should not produce any adverse effects to the worker. He stated that based on the Dow study there should be no off gassing of TDI from polyurethane foam.

Dr. Short concluded that a person working with polyurethane foam would have negligible exposure to TDI. He concluded that Claimant's condition in all probability was not caused by exposure to TDI.

On examination by Future Foam, Dr. Short indicated that Chemir found TDA as a result of its testing. He stated that his impression was that TDI could be converted to TDA and that therefore he used the TDA as a measure of the amount of TDI in the foam.

On cross-examination by Claimant, Dr. Short admitted that he had never testified in a TDI case prior to his review of the evidence in Claimant's case. He acknowledged that the Dow Study which he relied upon did not involve foam being cut or the testing of foam dust. He admitted that the Dow Study did not test for whether TDI was released when a solvent was added to the foam.

Finally, Dr. Short admitted that one exposure to TDI could cause sensitization. He admitted that high TDI exposures were not always necessary for sensitization. He admitted that chronic low-level exposures below .02 parts per million had been reported to be capable of causing sensitization.

Finally, Claimant offered into evidence as part of her rebuttal case the testimony of Mr. Caroll Langenhorst. Mr. Langenhorst, who made a very credible witness, testified that he currently worked for Heart Industrial Machinery and Supply out of Oklahoma City, Oklahoma. He stated that he had worked at the Future Foam plant in Newton, Kansas for 18 ½ years, from February 1973 until August 1991.

Mr. Langenhorst testified that he was a polyurethane foam chemist and production manager for Future Foam. He stated that as part of his job duties he was responsible for the manufacture and production of polyurethane foam.

Mr. Langenhorst defined the term TDI index as a description of the amount of TDI put into the chemical mixture to make the foam. He stated that they regularly made foam at the Newton, Kansas plant with a TDI index approaching 130. He stated that the foam they made at the Newton, Kansas plant was shipped to the Kansas City location. He stated that 80 percent of the foam used in the North Kansas City branch where Claimant worked was shipped from the Newton, Kansas manufacturing plant.

Mr. Langenhorst testified that foam with a 100 TDI index meant that the recipe was totally balanced. He indicated, however, that it took an excessive amount of TDI in the foam to make the formula work. He stated that although a TDI index of 103 would work, the foam was unstable with that amount of TDI. He stated that a higher TDI index in the foam made it firmer. He indicated that to get the firm foam the company wanted they had to add an excessive amount of TDI. He stated that 130-index foam meant that 30 percent more TDI was added to the mixture than was called for in the recipe.

Mr. Langenhorst testified that the foam would come out of the machine between 3 and 5 o'clock p.m. and that it would be delivered to Kansas City at 7 a.m. on the next day. He indicated that sometimes the foam was so hot when it was put in the trailer to be delivered to Kansas City that it had to be separated to prevent it from sticking together. He stated that the recommended cure time for foam was forty-eight hours.

Mr. Langenhorst testified on more than one occasion they received complaints from customers about fresh foam with unreacted TDI. He indicated that even after the recommended cure time for the foam, there would still be some residual TDI in it. He stated that he knew that there was residual TDI in the foam based on the smell of the foam. He stated that TDI had a unique smell.

Finally, Mr. Langenhorst testified that the Kansas State Health and Environmental inspectors had found TDI in the storage area at the Newton, Kansas plant and traces of TDI in the fabrication area of the plant. He stated that no TDI was found in any other areas of the plant.

On cross-examination by Future Foam, Mr. Langenhorst testified that he stopped working for the company in August 1991 due to concerns about how the job was affecting his health. He stated that he had not sued Future Foam and that he had not filed any workers' compensation claims against the company. He also admitted that the company usually cured the foam for forty-eight hours.

Finally, Mr. Langenhorst testified that he had personal knowledge of at least one other worker claiming that

he had contracted asthma by being exposed to TDI at Future Foam. He stated that the worker who claimed to have contracted asthma was employed in the pouring facility and in bun storage, but not in fabrication.

The other depositions, testimony at the hearing, and the numerous other exhibits, both medical and otherwise, were essentially cumulative of the testimony.

LAW

After considering all the evidence, including the testimony at the hearing, the medical and other depositions, the numerous medical reports and other exhibits, the other expert testimony, and observing the appearance and demeanor of Claimant and the other witnesses at the hearing, I find and believe that Claimant has met her burden of proving that she sustained an occupational disease while employed by Future Foam and Personnel Pool. Thus, I find that both Personnel Pool and Future Foam are liable for benefits.

I also find that Claimant's employers were not prejudiced by the alleged failure to receive proper notice of the occupational disease. I find that Claimant has proven that as a result of her injuries that she sustained a permanent partial disability of 80 percent to the body as a whole. At a rate of \$113.33 per week for 320 weeks, her employers are liable for \$36,265.60. Finally, Claimant has proven her employers' liability for future medical benefits. She has not proven her employers' liability for past or future temporary total disability benefits nor all the past medical aid she alleged.

The applicable statute defines an occupational disease as follows:

Occupational disease defined . . .

1. In this chapter the term "occupational disease" is hereby defined to mean, unless a different meaning is clearly indicated by the context, an identifiable disease arising with or without human fault out of and in the course of employment. Ordinary diseases of life to which the general public is exposed outside of the employment shall not be compensable, except where the diseases follow as an incident of an occupational disease as defined in this section. The disease need not to have been foreseen or expected but after its contraction it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence.
2. An occupational disease is compensable if it is clearly work related and meets the requirements of an injury which is compensable as provided in subsections 2 and 3 of section 287.020. An occupational disease is not compensable merely because work was a triggering or precipitation factor.

§287.067 (1) and (2) RSMo (1993)

The statute defines accident as follows:

2. The word "accident" as used in this chapter shall, unless a different meaning is clearly indicated by the context, be construed to mean an unexpected or unforeseen identifiable event or series of events happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury. An injury is compensable if it is clearly work related. An injury is clearly work related if work was a substantial factor in the cause of the resulting medical condition or disability. An injury is not compensable merely because work was a triggering or precipitating factor.
3. (1) In this chapter the term "injury" is hereby defined to be an injury which has arisen out of and in the course of employment. The injury must be incidental to and not independent of the relation of employer and employee. Ordinary, gradual deterioration or progressive degeneration of the body

cause by aging shall not be compensable, except where the deterioration or degeneration follows as an incident of employment.

(2) An injury shall be deemed to arise out of and in the course of the employment only if:

- (a) It is reasonably apparent, upon consideration of all the circumstances, that the employment is a substantial factor in causing the injury; and
- (b) It can be seen to have followed as a natural incident of the work; and
- (c) It can be fairly traced to the employment as a proximate cause; and
- (d) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life. . .

§287.020 RSMo (1993)

In Claimant's case, the evidence showed that she had a very mild case of asthma prior to 1991. The evidence also showed that she was exposed to TDI while working for Future Foam and Personnel Pool in October and November 1991. The evidence showed that after her exposure to the TDI she developed a severe and permanent case of asthma characterized by all the testifying physicians as Class 4 or severe.

The most credible, competent evidence showed that Claimant's employer, Future Foam, routinely put more TDI into the mixture to make the foam than was called for in the recipe. Mr. Langenhorst, a former employee of Future Foam and who made a very credible witness, testified that he personally made the foam used in the Kansas City plant. He stated that the company routinely put 30 percent more TDI in the mixture than was called for in the recipe. Future Foam's own expert, Dr. Stone, admitted that if the mixture contained 30 percent more TDI than the recipe recommended, all the TDI would not react.

In addition, Mr. Langenhorst testified that his plant in Newton, Kansas routinely shipped foam which was not cured to the North Kansas City fabrication plant where Claimant worked. He stated that while the foam was supposed to be cured for forty-eight hours, they often shipped the foam to the Kansas City plant in less than half that time.

No evidence was offered which contradicted Mr. Langenhorst's testimony. Thus, based on his testimony and the other competent evidence, Claimant has proven that uncured foam was shipped from the Newton, Kansas plant to the fabrication plant in North Kansas City. The uncontroverted evidence was that uncured foam would have unreacted TDI contained within it.

In addition, Claimant has proven by the most credible, competent evidence that TDI was in the foam she worked on at the Future Foam fabrication plant. Claimant had samples of foam from the fabrication plant in North Kansas City, Missouri tested for the presence of TDI by Midwest, Fayette, and Braun Intertec Laboratories. Each laboratory found TDI in the foam. The TDI found in the foam in several of the samples was well in excess of the limitations imposed by OSHA for a safe workplace.

The testimony by the chemists at the laboratories employed by Claimant was clear, concise and detailed as to the testing methods. Their testimony was credible and competent. Their testimony was sufficient to meet Claimant's burden of proving that she was exposed to TDI while in the course and scope of her employment.

Based on the medical evidence, Claimant has further proven that her exposure to the TDI was the cause of her Class 4, severe asthmatic condition. Dr. David Hof, a board-certified pulmonologist, testified that Claimant's asthma was caused by her exposure at work. He indicated that the toxic exposure was most likely caused by TDI. Dr. Parmette, board-certified in occupational and aerospace medicine and a Ph.D. candidate in toxicology, testified that Claimant's asthma was caused by her exposure to TDI in the work force. Both physicians explained in a clear, concise, and credible manner the bases for their opinions. The medical and other evidence, including the testimony of Dr. Walazek, a toxicologist, supported their opinions. Thus, Claimant has met her burden of proving that her Class 4 or severe asthma was caused by her exposure to the TDI at work.

The applicable statute pertaining to notice provides as follows:

Written notice of injury to be given to employer-exceptions. – No proceedings for compensation under this chapter shall be maintained unless written notice of the time, place and nature of the injury, and the name and address of the person injured, have been given to the employer as soon as practicable after the happening thereof but not later than thirty days after the accident, unless the division or the commission finds that there was good cause for failure to give the notice, or that the employer was not prejudiced by failure to receive the notice. No defect or inaccuracy in the notice shall invalidate it unless the commission finds that the employer was in fact misled and prejudiced thereby.

§287.420 RSMo (1993)

Thus, the statute provides that the employee must give written notice of the time, place, and nature of the injury. Case law, however, provides that in occupational disease cases the notice statute is inapplicable. Kintz v. Schnuck's Markets, Inc., 889 S.W.2d 121 (Mo.App. 1994). In Kintz, a repetitive trauma case, the Court noted that §287.420 presupposed knowledge of a work-related injury. The Court stated that an employee could not give written notice of the time, place and nature of an injury where she did not know and could not know facts which the notice required. The Court stated that in a repetitive trauma case the notice statute was inapplicable at least until the Claimant had knowledge of those facts which must be in timely notice.

Claimant's case involved an occupational disease and was thereby akin to the facts in Kintz. Thus, the notice statute as cited above was not applicable to her case. Moreover, while the Court in Kintz indicated that the notice statute would not be applicable at least until the employee had knowledge of those facts which must be in timely notice, there was no evidence offered by Claimant as to the exact date that a physician advised her that her respiratory condition was caused by her exposure to a substance at work. Therefore, Claimant did not prove that she provided her employer with notice of her alleged injury or occupational disease within thirty days of when she became aware of a job-related condition.

The notice statute also provides, however, that if a Claimant fails to provide timely notice, her claim is not defeated if she shows that her employer was not prejudiced by the failure to receive such notice. In Claimant's case, she has proven that her employer was not prejudiced by the alleged failure to receive timely or proper notice.

The most credible, competent evidence showed that in late 1991 Claimant developed a severe case of asthma. The evidence showed that all the treatment she received for her asthmatic condition would have been required had she provided her employer with timely and proper notice of her alleged occupational disease. In addition, there was no evidence that Claimant's employers were prejudiced in any way by Claimant's alleged failure to provide proper and timely notice. Thus, Claimant has met her burden of proof on the notice issue.

Claimant has also proven that she sustained a permanent partial disability of 80 percent to the body as a whole as a result of the occupational disease she contracted in her employment with Future Foam and Personnel Pool. In so finding, it was recognized that Claimant alleged that she was rendered permanently and totally disabled by the occupational disease. The evidence, however, did not support Claimant's allegation.

The alleged occupational disease was contracted in October and November 1991 while Claimant worked for Future Foam and Personnel Pool. The evidence showed that Claimant worked until January 1998. Thus, she worked for nearly seven years after the alleged exposure. During that seven-year period she was able to complete a program at a business college providing her with even more skills to do sedentary work in a clean office environment. She is also twenty- six years old. She is not a worker closely approaching an advanced age and who might have trouble being retrained to various sedentary jobs in a clean office environment.

Furthermore, no doctor advised Claimant to stop working in January 1998. No doctor told her that she could not work in January 1998. The most credible evidence showed that she stopped working because the Social Security Administration awarded her disability benefits. That, however, does not prove that she was permanently and totally disabled for purposes of the Workers' Compensation Act.

In addition, nothing happened in 1998 which showed that Claimant's condition became more disabling at

that time or that it had deteriorated to the point where she was no longer employable. In fact, the treating physician she chose, Dr. Hof, a board-certified pulmonologist, testified that by August 1998 Claimant's condition had improved under a new treatment program and that he expected her to be able to return to the work force by June 1999.

Dr. Hof testified in a clear, concise and thorough manner. He made a credible witness. His testimony and the other evidence showed that Claimant failed to meet her burden of proving that she was rendered permanently and totally disabled by the occupational disease.

Moreover, the only other pulmonologist who testified in the case, Dr. Kerby, concluded that Claimant was not permanently and totally disabled. He believed that Claimant could engage in substantial gainful activity as long as it was in a clean work environment.

Even Mr. Swearingen, a vocational expert, employed by Claimant testified that Claimant could work on an intermittent basis. He admitted that Claimant had good academic skills. Later, when he seemed to indicate that Claimant could not engage in substantial gainful activity, he factored in such things as the loss of Medicaid and Medicare benefits should she return to work and her medical insurability problems. Those factors, however, have nothing to do with whether Claimant is permanently and totally disabled. Thus, his opinion was not entitled to much weight.

Claimant did prove that she sustained a permanent partial disability of 80 percent to the body as a whole as a result of her occupational disease. Drs. Hof, Parmette, and Kerby concluded that Claimant's asthma was classified as Class 4. As noted above, Dr. Hof testified that he believed that Claimant would be able to return to work in June 1999. Dr. Parmette concluded that Claimant had sustained a permanent partial disability of 80 percent to the body as a whole. Dr. Kerby rated Claimant's permanent partial disability from her asthma at 70 to 80 percent to the body as a whole. He did not believe that any of the disability resulted from the alleged occupational disease.

Thus, as noted earlier Claimant has proven that she sustained an occupational disease. Based on the evidence she has proven that she sustained a permanent partial disability of 80 percent to the body as a whole as a result of her occupational disease. At a rate of \$113.33 per week, for 320 weeks, that yields \$36,265.60 owed to Claimant by her employers.

Claimant has failed to prove her employers' liability for any additional temporary total disability benefits. Prior to the hearing, Claimant placed in issue whether her employers were liable for temporary total disability benefits for the period January 20, 1998, to the present and into the future as the evidence might show.^[2] Claimant stopped working effective January 20, 1998. As noted earlier, she had worked for nearly seven years subsequent to the accident. She offered no evidence that her asthmatic condition had deteriorated in any way immediately prior to January 20, 1998. No doctor testified that she was temporarily and totally disabled effective January 20, 1998, or for any period thereafter. No credible evidence supported her allegation that she was temporarily and totally disabled for any period subsequent to January 20, 1998. Thus, she failed to prove her employers' liability for any temporary total disability benefits for the periods so claimed.

Claimant has also failed to prove her employers' liability for any past medical aid other than those bills incurred for her initial emergency room treatment and hospitalization in November 1991. The statutes pertaining to medical treatment provide that the employer has the right to direct such treatment. §287.140 (10)(1993). The statute also provides that the employee may choose her own treating physician, but at her own expense. §287.140(1)

Claimant offered no evidence as to when she was advised by a physician that she had contracted an occupational disease. She incurred her initial medical bills in November 1991 due to an emergency situation. When she incurred the bills at that time she did not know that she had contracted an occupational disease. Dr. Hof testified that the treatment Claimant received in November 1991 was reasonable and necessary and that the charges for the treatment were fair and reasonable.

Thus, Claimant has proven her employers' liability for the treatment she received in November 1991. Her

employers are liable for the hospital bill from November 1991, the bills for the tests ordered at that time and the charges by her treating and all consulting physicians during that hospitalization. See a/so Shoehan v. Springfield Seed & Floral, 733 S.W.2d 795 (Mo.App. 1987) where the Court found the employer liable for the medical aid incurred prior to when the employee became aware of the job-related occupational disease.

There is nothing in the statute or the applicable case law, however, which provides that in an occupational disease case the employee may go out and incur hundreds of thousands of dollars in bills for medical treatment without notifying her employer of the alleged occupational disease or asking for such treatment and then, at a later date, get reimbursed for the cost of such treatment. Claimant did not notify her employers of the alleged occupational disease until she filed her claim for compensation well over a year after she terminated her employment with Personnel Pool and Future Foam. She never asked for medical treatment. She worked on other jobs where she was exposed to gasoline and fumes which may have aggravated her respiratory condition. Thus, this is a case where Claimant chose to direct her own medical treatment. As such, she is not entitled to be reimbursed by her employers except for those bills incurred prior to when she was advised that she had contracted a job-related condition.

Claimant has proven her employers' liability for future medical treatment. Both Drs. Hof and Kerby, the two pulmonologists, agreed that Claimant would need future medical treatment to cure and relieve her of the effects of her asthmatic condition. No credible, competent evidence was offered which contradicted their opinions. Thus, based on the evidence Claimant has met her burden of proving her employers' liability for future medical treatment. Her employers, however, have the right to direct the medical treatment.

Claimant has proven that both Future Foam and Personnel Pool were liable for benefits as joint employers. The statute defines employee as "every person in the service of any employer under any contract of hire, express or implied, oral or written..." §287.020 RSMo (1993). The statute defines an employer as "every person, partnership, association, corporation...using the services of another for pay..." §287.030 RSMo (1993). Case law defines a joint employment situation as one where an employee is subject to the control of two or more employers. See Stone v. Heisten, 777 S.W.2d 664 (Mo.App. 1989); Hartford Accident & Indemnity Co. v. Travelers Insurance Co., 525 S.W.2d 612 (Mo.App. 1975).

Claimant was clearly in the service of both Personnel Pool and Future Foam for pay. The evidence showed that Personnel Pool was a temporary employment agency which provided employees on a temporary basis to various employers. The evidence showed that Personnel Pool contracted with Future Foam to provide temporary employees. The evidence showed that Claimant was under an employment contract with Personnel Pool which referred her to Future Foam to work as a temporary employee. Claimant worked at the Future Foam facility.

The evidence showed that Claimant was paid wages by Personnel Pool. Future Foam, however, paid Personnel Pool the money to pay Claimant for the work she performed at the Future Foam factory. Neither Personnel Pool, nor Future Foam, provided any type of benefits to Claimant.

The evidence further showed that all the equipment Claimant used to perform her job was furnished by Future Foam. It also set Claimant's work hours and controlled her working conditions. Claimant's supervisor was a Future Foam employee. Future Foam had the right to terminate its employment relationship with Claimant. Personnel Pool also had the right to terminate its employment relationship with Claimant.

Thus, based on the most credible, competent evidence it must be found that Claimant was subject to the control of both Personnel Pool and Future Foam. As such they were joint employers of Claimant. Joint employers are severally, as well as jointly liable for benefits. See §287.130 RSMO (1993). Martin v. Mid-America Farm Lines, Inc., 769 S.W.2d 105 (Mo.banc 1989). Therefore, both Future Foam and Personnel Pool are jointly and severally liable for benefits. Both are ordered to make payments in accordance with the findings in this award.

Both employers are, however, entitled to a credit based on the \$50,000 Claimant recovered following her March 1994 hospitalization at St. Luke's Hospital due to an asthma problem. Claimant testified that in March 1994, she was given an aspirin-based medication at St. Luke's Hospital and that she experienced a severe reaction. She admitted that she subsequently made a recovery of \$50,000 from St. Luke's Hospital due to its alleged negligence.

Under §287.150 RSMO (1993) an employer has a subrogation interest in any recovery by an employee from a third party who provided negligent treatment for a job-related injury. Here, Claimant went to St. Luke's Hospital for her asthma. She alleged that St. Luke's Hospital provided negligent treatment and she made a \$50,000 recovery. Thus, her employers are entitled to a credit based on the \$50,000 recovery.^[3]

Finally, in finding that Claimant met her burden of proving her employers' liability for benefits, it was recognized that conflicting evidence existed. Claimant's employers argued that Claimant failed to prove that she had contracted an occupational disease. As noted earlier, however, Claimant offered the more credible evidence on the issue of whether she was exposed to TDI. Even Claimant's employers' own experts offered evidence which supported Claimant's position. Dr. Stone admitted that all the TDI would not react in foam with a TDI index of 130. Claimant proved that her employer had regularly made foam with a 130 TDI index. Mr. Knudtson an employee of Future Foam admitted that OSHA had found that some employees of Future Foam were exposed to TDI, albeit not in the fabrication plant or at unsafe levels. His testimony, nevertheless, contradicted Claimant's employers' allegation that no TDI would be in the foam.

In addition, Dr. Kerby, a board-certified pulmonologist, concluded that Claimant's asthma was not the type caused by exposure to a chemical. Dr. Kerby indicated that Claimant had triad asthma, which was characterized by nasal polyps and aspirin sensitivity, and that such asthma was not recognized in the medical literature as being chemically induced.

Dr. Kerby, however, offered no medical literature or any evidence in support of his theory. He failed to explain why Claimant's very mild asthma became severe and of a Class 4 type within weeks of her employment at the Future Foam factory.

Drs. Hof and Parmette discounted the notion that nasal polyps and aspirin sensitivity meant that Claimant's asthma could not have been job-related. Both explained that the radical change in Claimant's condition around November 1991 was caused by her exposure to the TDI. Both gave a credible and reasonable explanation for their opinion that TDI had caused Claimant's condition.

Thus, the evidence showed that the opinions of Drs. Parmette and Hof were entitled to more weight than Dr. Kerby's on the issue of whether Claimant's asthma was caused or even aggravated by her work at the Future Foam factory. In addition, in support of the medical evidence, Claimant offered the opinion of Dr. Walazek, an eminently qualified toxicologist, who concluded that Claimant became sensitized at work by a dermal exposure or possibly by both a dermal and inhalation exposure. Dr. Walazek was thorough, confident, and firm in his opinion.

In conclusion, Claimant has met her burden of proving that she contracted an occupational disease while a joint employee of both Personnel Pool and Future Foam. She has met her burden of proving that neither employer was prejudiced by her failure to provide proper notice under the applicable statute. She has met her burden of proving that as a result of the occupational disease she contracted in the employ of Personnel Pool and Future Foam that she sustained a permanent partial disability of 80 percent to the body as a whole. Her employers are liable for \$36,265.60 in permanent partial disability benefits. They are entitled to a credit based on her third party recoveries.

Claimant has not met her burden of proving her employers' liability for the temporary total disability benefits claimed, nor for most of the past medical benefits claimed. She has proven her employers' liability for future medical benefits. The benefits awarded are also subject to the lien filed by the Missouri Department of Social Services.

Date: _____

Made by:

Kenneth J. Cain
Chief Administrative Law Judge

Division of Workers' Compensation

A true copy: Attest:

Jo Ann Karll

Director

Division of Workers' Compensation

[1] Personnel Pool and Future Foam objected to Dr. Hof's rating being admitted into evidence on the basis that it had not been provided to them seven days prior to the testimony. Dr. Hof's second deposition was taken more than one year after the initial one. Thus, both alleged employers had ample opportunity to prepare for the cross-examination of the doctor on his rating at the second deposition. Therefore, the rating was admitted into evidence.

[2] Claimants' post trial brief argued that her employers were liable for past temporary total disability benefits for various periods prior to January 20, 1998. Only those periods placed in issue, however, were addressed in the award.

[3] Subsequent to the hearing, Claimant made a recovery in another third-party lawsuit. That action was against the TDI manufacturer. Claimant is ordered to disclose the amount of the recovery to her employers, who have a subrogation interest in the recovery.